

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 421 of 1980

with

SECOND APPEAL No 422 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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PATEL NARSHI LADHA

Versus

PATEL RAJA HARJI

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Appearance:

MR PV HATHI for Appellants

MR MEHUL SHAH for Respondent

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 10/09/98

ORAL JUDGMENT

Heard the learned counsel for the parties.

2. These Appeals arise from the Regular Civil Suit No.65 of 1976 and Regular Civil Suit No.13 of 1977 which were consolidated by the trial Court for trial. The learned trial Court dismissed the Civil Suit No.65 of 1976 and Civil Suit No.13 of 1977 for declaration and permanent injunction was decreed. Against the decree and judgment of the learned trial Court in both these suites the defeating parties filed their Appeals before the Appellate Court. The Appeals were allowed. Hence these Second Appeals.

3. The plaintiff Patel Raja Harji filed Civil Suit No.65 of 1976 in the Court of Civil Judge (J.D.), Kalawad, District Jamnagar with the averments that he resides at village Nani Bhalshan and the defendants reside at village Bareja. Both are agriculturists having fields adjacent to each other. One field known as "Piparia" belongs to the plaintiff admeasuring 10 acres. For going to his field he had purchased 8 ft. wide way on the eastern side of the field of one Jaga Vela by a registered document dated 14.1.74. The field from which the plaintiff had purchased the way for going to his field is now sold by Jaga Vela to the defendants. It is contended that it is within the knowledge of the defendants that the plaintiff had purchased right of way from Jaga Vela who is predecessor-in-title of the present defendants. The defendants had never obstructed the plaintiff from using that way, but the plaintiff was obstructed before three years of filing of the suit. Hence the plaintiff filed the suit for declaration that the disputed way belongs to him and he is in possession of the way. He further prayed for a permanent injunction restraining the defendants from obstructing his way. At the time of institution of the suit interim injunction was also granted. The suit has been resisted by defendants Patel Narshi Ladha and Patel Damji Narshi. It is contended that the plaintiff has got no right of way as alleged and that there is no question of obstructing the plaintiff as he was never using the way as claimed by him. It is further alleged that the field from which the plaintiff is claiming right of way belongs to the defendants and they are the sole owners thereof. Nobody has any right of way to pass through their field.

4. The defendants of the Civil Suit No.65 of 1976 also filed one suit against the plaintiff of this suit on 13.1.77 in the trial Court which was registered as Regular Civil Suit No.13 of 1977. This suit has been filed for the same subject matter and for declaration and permanent injunction. On the purshis filed by the learned counsel for the parties, these two suits were

consolidated to avoid any delay.

5. The suit of Patel Raja Hirji, being Civil Suit No.65 of 1976 had been dismissed by the trial Court on 30th September 1978. The suit filed by the defendants being Civil Suit No.13 of 1977 has been decreed by the trial Court on the same date and they were declared to be sole owners and in possession of the field Survey No.71 admeasuring 9 acres and 27 gunthas and a permanent injunction has also been granted in their favour as claimed by them in the Plaint para-5(B) of the said suit. Dissatisfied with this judgment and decree, the plaintiff in the Civil Suit No.65 of 1976 and the defendant in the Civil Suit No.13 of 1977 filed Regular Civil Appeals No.118 of 1978 and No.26 of 1979 in the appellate court which came to be decided by the Extra Assistant Judge, Jamnagar on 18th July 1980. Both these appeals were allowed. The judgment and decree of the learned trial Court in Regular Civil Suit No.65 of 1976 and that in Regular Civil Suit No.13 of 1977 were set aside. The Civil Suit No.65 of 1976 of the plaintiff, namely Patel Raja Harji was decreed and a declaration has been given that he has got the right of way by virtue of sale deed dated 14th February 1974, for his field "Piparia" of sim of Nani Bhalsan through the eastern boundary of the land of Survey No.71 of the defendants having width of 8 ft. and the defendants and agents were restrained perpetually from obstructing the plaintiff from using said way having width of 8 ft. for going to his field and for coming out of his field and from taking carts, bullocks, cattle, etc. through that way. The Civil Suit No.13 of 1977 has been dismissed and the decree passed by the learned trial Court therein has been set aside. Hence these two Second Appeals by Patel Raja Harji, i.e. by the plaintiff in Regular Civil Suit No.13 of 1977 and defendant in Regular Civil Suit No.65 of 1976.

6. From the document ex.36, I find that Jaga Vela had not sold all his interest in the land Survey No.71 to the defendant-appellant. He continued as owner even after March 1973 and the defendants were in possession of that land merely as mortgagee. So Jaga Vela had a right to sell the right of way to the plaintiff-respondent. The defendants being mortgagees could not have better title than Jaga Vela in the land of Survey No.71. Jaga Vela himself had sold the right of way and allowed the plaintiff to use that way for about two years. The learned first appellate Court has rightly observed that the defendants have given implied consent to sell the right of way and the sale transaction of the right of way is binding on the defendants-appellants. After

appreciation of oral and the documentary evidence, the learned first appellate Court has rightly reached to the conclusion that the plaintiff-respondent had proved that he had purchased the right of way having width of 8 ft. from south to north from the land of Survey No.71 inside its eastern boundary from Jaga Vela by a registered Sale Deed dated 4.2.61. The finding of the fact that the plaintiff has been using that way for going to his field since that day and the rights created under the said Sale Deed are binding on the defendants-appellant are findings of facts which based on appreciation of oral and documentary evidence, recorded by the first appellate Court does not suffer from any infirmity or illegality which calls for interference of this Court. The learned counsel for the appellant failed to make out any case for interference of this Court. I do not find any question of law, much less a substantial question of law does arise in these Appeal for interference of this Court. When the Civil Suit No.65 of 1976 is decreed by the appellant Court, then as a consequence thereof, the Civil Suit No.13 of 1977 has to be dismissed and accordingly it has been dismissed.

7. In the result, both these Second Appeals fail and the same are dismissed with no order as to costs.

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(sunil)